

STATE OF MICHIGAN
COURT OF APPEALS

RONALD D. PEPPLER,

Plaintiff-Appellant,

v

THE PEPPLER AGENCY, INC., and JANET L.
PEPPLER,

Defendants-Appellees.

UNPUBLISHED

December 13, 2011

No. 300194

Wayne Circuit Court

LC No. 09-025460-CK

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiff Ronald D. Peppler (Ronald) appeals by right the circuit court's grant of summary disposition in favor of defendants The Peppler Agency, Inc. (Peppler Agency) and Janet L. Peppler (Janet). We affirm, albeit in part for different reasons than those relied on by the circuit court.

I

Ronald and Janet were married in 1973. As husband and wife, Ronald and Janet owned, operated, and managed the Peppler Agency, a small, closely held insurance company in Harper Woods, Michigan. Ronald and Janet divorced in 1999, but continued as co-owners and co-managers of the Peppler Agency. At the time of the divorce, Ronald owned 55 percent of the Peppler Agency's stock and Janet owned 45 percent of the Peppler Agency's stock. Also in 1999, Ronald and Janet entered into a Stock Redemption and Deferred Compensation Agreement (the 1999 Agreement). The 1999 Agreement provided that the Peppler Agency could purchase all of a shareholder's stock and pay deferred compensation to the shareholder or his or her beneficiaries under certain circumstances including the death of the shareholder, the long-term disability of the shareholder, or the termination of the shareholder's employment with the company.

Ronald subsequently became addicted to cocaine and took a prolonged leave of absence from the Peppler Agency to seek inpatient treatment. In November 2000, Ronald appointed Janet as his attorney-in-fact pursuant to a durable power of attorney. The durable power of attorney granted Janet full legal authority to hold, sell, or encumber any of Ronald's real or personal property, to access and withdraw any money from Ronald's bank accounts, to exercise all powers and options with regard to Ronald's life insurance policies and employee-benefit

plans, to prosecute or defend any lawsuit on Ronald's behalf, to hire or terminate any employee on Ronald's behalf, to vote as Ronald's proxy in any corporation in which he held stock, to place Ronald in any hospital or medical facility, and to otherwise manage all of Ronald's assets and affairs.

Ronald was arrested and charged with drug possession in August 2001, and then again in February 2002. Following his arrest in February 2002, Ronald resigned as an officer and director of the Peppler Agency. However, Ronald continued as the Peppler Agency's resident agent and as a 55-percent owner of the company. Ronald also continued to collect reduced annual payments of \$50,000 and other fringe benefits from the Peppler Agency. Ronald maintains that these annual payments of \$50,000 plus benefits constituted proof that he continued serving as an employee of the Peppler Agency even after his resignation as an officer and director in February 2002. In contrast, Janet maintains that Ronald's employment was completely terminated as of February 2002, and that the payments of \$50,000 a year were merely part of the deferred compensation to which Ronald was entitled in exchange for the redemption of his stock under the 1999 Agreement.

Janet allegedly sent a letter to Ronald in March 2002, informing him that his employment with the Peppler Agency had terminated, that the company was redeeming his stock pursuant to the 1999 Agreement, and that the continued payments of \$50,000 a year were part of the deferred compensation to which he was entitled in exchange for his stock under the 1999 Agreement. Ronald has consistently denied that he ever received such a letter.

Then, in August 2003, Janet sent her attorney to meet with Ronald and to ask Ronald to convey all his stock to the Peppler Agency. Ronald refused, insisting that he was still on a leave of absence from the Peppler Agency and that he remained an employee of the company. Ronald informed Janet's attorney that he would be calling a meeting of the shareholders to make clear that he was still on a leave of absence, that he remained an employee of the Peppler Agency, and that he would not be selling his stock to the company. It does not appear that any such meeting of the shareholders was ever held.

In September 2003, Janet sent another letter to Ronald, again informing him that his employment had terminated and that the Peppler Agency would be redeeming his stock under the terms of the 1999 Agreement. The letter proposed that the redemption of Ronald's stock should be fully completed by September 30, 2003. However, Ronald still had not agreed to sell his stock by the end of September 2003.

On October 13, 2003, Ronald was arrested on firearms-related charges and lodged in the Wayne County jail. Ronald's court-appointed attorney informed him that he would likely be sentenced to prison if ultimately convicted. Ronald became disenchanted with his appointed attorney and contacted Janet to ask for her assistance in retaining a different criminal defense attorney to represent him. Janet informed Ronald that she would assist him in locating a new defense attorney, but asked him in exchange to sign a Stock Redemption Agreement (the 2003 Agreement). The 2003 Agreement confirmed that Ronald's employment with the Peppler Agency had terminated, that Ronald's shares would be redeemed by the company, that Ronald would be paid \$220,000 for his stock, and that Ronald would receive additional deferred compensation of \$50,000 per year for 72 months. Ronald finally agreed to sell his shares to the

Peppler Agency and signed the 2003 Agreement on October 29, 2003.¹ Ronald now contends, among other things, that he had no choice but to sign the 2003 Agreement because he was incarcerated and in a vulnerable state; he claims that he signed the document under duress.

Janet succeeded in retaining a different defense attorney for Ronald, and Ronald was sentenced to a drug treatment program in lieu of prison. However, Ronald left the drug treatment program before completing it and was subsequently rearrested in 2004. Thereafter, Ronald was ultimately convicted and sentenced to prison, where he served two years of his sentence before being released on parole in October 2006. Ronald was finally discharged from parole on April 17, 2008.

Meanwhile, Ronald's insurance producer license had been suspended by the Michigan Office of Insurance and Financial Regulation (OFIR). In early 2009, Ronald requested reinstatement of his insurance producer license, but the OFIR refused on the ground that he had been convicted of a felony. See MCL 500.1205(1)(b); MCL 500.1239(1)(f).

Ronald then informed Janet that he wished to "end his leave of absence" and return as an employee and co-owner of the Peppler Agency. Believing that Ronald had sold his stock and terminated his employment by way of the 2003 Agreement, Janet refused Ronald's request. Ronald subsequently began investigating Janet's activities and the Peppler Agency's finances and allegedly discovered that Janet had converted substantial sums of money from various joint accounts during the previous several years. For instance, Ronald discovered that Janet had withdrawn \$100,000 from a jointly owned Morgan Stanley investment account on March 27, 2002. Ronald also discovered that Janet had withdrawn several smaller sums from various other accounts. During discovery, Ronald also allegedly discovered that the Peppler Agency had paid Janet more than \$450,000 in unauthorized bonuses during 2002 and 2003.

On October 16, 2009, Ronald filed the instant action in the Wayne Circuit Court, seeking both money damages and equitable relief. Ronald set forth claims of breach of fiduciary duty, breach of contract, conversion, and fraud. He also sought an accounting, the imposition of a constructive trust, and rescission of the 2003 Agreement on the grounds of duress, undue influence, and fraud.

On February 10, 2010, defendants moved to dismiss Ronald's claim of breach of fiduciary duty and his three claims seeking rescission of the 2003 Agreement pursuant to MCR 2.116(C)(7). Defendants argued that these four claims were all barred by the doctrine of laches. In particular, defendants pointed out that Ronald had waited almost six years after he signed the 2003 Agreement to file his lawsuit and asserted that he was not entitled to rescind the 2003 Agreement merely because he now had "seller's remorse." Defendants argued that the 2003 Agreement had been voluntarily and fairly entered into and that Janet had relied on the 2003 Agreement in her operation and management of the business since 2003. Specifically,

¹ Ronald has acknowledged receipt in full of the \$220,000 owed to him under the terms of the 2003 Agreement. The additional payments to Ronald in the amount of \$50,000 per year as deferred compensation appear to have continued during the pendency of this case as well.

defendants argued that Janet had invested significant time and money into the Peppler Agency since 2003, believing that the company belonged solely to her, and that it would be unfair to permit rescission of the 2003 Agreement after almost six years.

Plaintiff responded to defendants' motion by arguing that he had not waited too long to commence the lawsuit. He pointed out that he had been incarcerated until October 2006, and that he was not discharged from parole until April 2008. He also observed that he had been financially unable to tender back the \$220,000 and other consideration paid to him under the 2003 Agreement, but argued that this should not defeat his claims seeking rescission of the 2003 Agreement because it would be inequitable to require him to tender back the money when he could not afford to do so. Ronald additionally argued that Janet's fraudulent concealment of her financial activity and conversion of \$100,000 from the parties' joint investment account had impaired his ability to file the lawsuit earlier. He asserted that defendants should be precluded from invoking the doctrine of laches because Janet had acted with unclean hands; he further asserted that Janet's claims that she relied on the 2003 Agreement in building up the company were implausible and inherently incredible.

The circuit court held oral argument on defendants' motion on April 2, 2010. Defendants' attorney argued that Janet had relied to her detriment on the validity of the 2003 Agreement by investing her own time and money into the Peppler Agency since 2003. Counsel for defendants further asserted that Ronald could have filed his claims much earlier, even despite his incarceration and parole. Counsel contended that Ronald had waited too long to file the claims and that it would be prejudicial and unfair to allow rescission of the 2003 Agreement after nearly six years.

Ronald's attorney responded that his client had suffered from a drug addiction for the past six years and had been unable to commence the lawsuit any earlier. Counsel argued that Ronald had not wanted to sign the 2003 Agreement, but had been effectively coerced into doing so because he knew that Janet would not help him to retain an experienced criminal defense attorney if he did not sign the document. Counsel also asserted that his client had been dependent upon Janet for almost everything in 2003, and that Janet had promised to take care of him. Counsel claimed that Janet had violated this special relationship of trust and confidence by forcing Ronald to sign the 2003 Agreement and to sell his stock. He also asserted that Ronald had not been financially able to bring the action until 2009, and that the \$220,000 paid to Ronald under the 2003 Agreement was an unfairly low price for Ronald's stock.

The circuit court observed that Ronald had received \$220,000 under the terms of the 2003 Agreement and accordingly doubted counsel's representation that Ronald had been financially unable to commence the lawsuit until 2009. With respect to the \$100,000 that Janet had withdrawn from the parties' joint investment account, the court noted that half of the money had been held separately for Ronald's benefit in the form of a certificate of deposit and that Janet had likely withdrawn the money and placed it into the certificate of deposit to protect the assets while Ronald was in jail. The circuit court ruled that the reasons offered by Ronald for his delay in bringing the lawsuit were "unfounded" and that any rescission of the 2003 Agreement would prejudice defendants "enormous[ly]." The court concluded:

This woman has worked and kept this business going since really 2000 as a 45 percent stockholder. If this agreement is rescinded, [Janet] loses her ability to run the business because [Ronald] comes back as a 55 percent stockholder and run[s] the business without a license. No.

The circuit court ruled that Ronald had unreasonably delayed the commencement of his lawsuit and that his claim of breach of fiduciary duty and claims seeking rescission of the 2003 Agreement were barred by the doctrine of laches. On April 20, 2010, the circuit court entered an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) with regard to Ronald's claim of breach of fiduciary duty and his three claims seeking rescission of the 2003 Agreement.

On June 11, 2010, defendants moved for summary disposition of the remaining claims in Ronald's complaint pursuant to MCR 2.116(C)(10). With regard to Ronald's claim seeking the imposition of a constructive trust, defendants argued that Ronald's stock had been properly redeemed by the Peppler Agency more than six years earlier and that there was no basis for holding the stock in constructive trust. Defendants asserted that the stock had already been sold by way of the 2003 Agreement, that the sale was not tainted by fraud, misrepresentation, or concealment, and that it would not be inequitable to allow the 2003 Agreement to stand. With respect to Ronald's fraud claim, defendants argued that Ronald was not entitled to relief because he had not identified any false or misleading representations by Janet. Regarding Ronald's claim for an accounting, defendants argued that Janet had already voluntarily provided all the financial documents and records that Ronald was seeking. Indeed, defendants pointed out that Ronald had acknowledged receipt of these financial records at his deposition and that he was not making any further claim in this regard.²

With regard to Ronald's conversion claims, defendants argued that although Janet had withdrawn \$100,000 from the parties' joint investment account, she had placed Ronald's half, \$50,000, into an interest-bearing certificate of deposit for safekeeping. They pointed out that Janet had prepared and signed a document on March 27, 2002, stating that she had withdrawn \$100,000 from the parties' joint investment account, that she had deposited \$50,000 into her own personal account, and that she had deposited the other \$50,000 into a certificate of deposit at Comerica Bank "with the sole intention of safe keeping for Ron Peppler. This entire account is his account and should anything happen to me, be known that this \$50,000 belongs entirely to him." After the instant lawsuit was filed, Ronald requested a return of this \$50,000, and on January 4, 2010, Janet provided Ronald with a cashier's check from Comerica Bank in the amount of \$62,058.99, representing the full amount of principal and interest accrued on the certificate of deposit. Ronald testified at his deposition that his claim of conversion related to Janet's withdrawal of the \$100,000 had been "resolved" by way of the cashier's check from Comerica Bank. Regarding the other purported instances of conversion alleged in Ronald's

² In particular, Ronald testified at his deposition that although he had set forth a claim for an accounting in his complaint, "we've gone through discovery and that accounting has taken place and been done. . . . I don't believe there are any remaining open items."

complaint, Ronald similarly testified at his deposition that the sums of money in question had all been accounted for and that the matters had all been resolved to his satisfaction. Accordingly, defendants argued that there remained no genuine issues of material fact and that Ronald's conversion claims should be dismissed.

Lastly, defendants argued that Janet had not breached the 1999 Agreement by asking or inducing Ronald to sign the subsequent 2003 Agreement. Ronald had previously alleged that, under the 1999 Agreement, the understanding of the parties was that he could take an indefinite paid leave of absence from the Peppler Agency and could return to full employment at the end of the leave of absence. But defendants pointed out that, even if this were true, the 2003 Agreement expressly provided that it superseded the 1999 Agreement to the extent that the two documents were inconsistent. Moreover, the 2003 Agreement specifically stated that Ronald's "employment with the [Peppler Agency] has terminated." Defendants further argued that Ronald had freely and voluntarily signed the 2003 Agreement and that there had been no undue influence or duress involved in the execution of the document. Even assuming that Janet had in fact informed Ronald that she would not assist him in retaining new defense counsel unless he signed the 2003 Agreement and agreed to sell his stock, defendants contended that Janet made no actual threats and that her conduct did not rise to the level of undue influence or duress. Defendants suggested that duress required the commission of an illegal act and that Janet had done nothing unlawful. In addition, defendants contended that there could not have been any undue influence because Janet had not owed a fiduciary duty to Ronald.

The circuit court held oral argument on defendants' motion for summary disposition of the remaining claims. After the parties had reiterated their arguments at length, the circuit court ruled that there remained no genuine issues of material fact and that defendants were entitled to judgment as a matter of law. The court observed in pertinent part:

In this case, counts 1 through 4 were [already] dismissed on summary disposition. The remaining counts . . . will also be dismissed. I think the testimony was clear in [Ronald's] deposition. As I stated, I read it. From page 19 forward, he was satisfied with all the accountings . . . during this case and [testified] that he wasn't pursuing those, which means that there can be no count for an accounting since he was satisfied with them. There can be no fraud because he's satisfied with all the accountings. And I agree [Janet] did take \$50,000 and placed it in a CD for [Ronald's] benefit. He was paid that amount plus his interest on that. And now . . . I know the fact that this was a joint account and at any time he could have taken the money out, and it's a good thing that [Janet] did [deposit the money into the account]. [T]here's no conversion here. [Janet] kept the money in a trust account and [Ronald has] been paid. Certainly there's no breach of contract.

I guess the argument is that the 2003 [Agreement] is a voidable contract and a breach of the 1999 contract. There is no fiduciary relationship here, nor is there any unlawful act. The duress that he had to sign this agreement or she wouldn't get him an attorney is such a red herring that I can't believe it. [Ronald] asked [Janet] for help to begin with. And [Janet] had already requested that he sell his stock. . . . As I stated, there is no undue influence and there certainly is no

fiduciary duty. There were no threats made to [Ronald] in any documentation I've seen.

On August 20, 2010, the circuit court entered an order granting summary disposition in favor of defendants with respect to Ronald's remaining claims. Ronald has timely appealed.

II

We review de novo the circuit court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It is well settled that this Court will affirm the circuit court if it reached the correct result, even if it did so for the wrong reason. *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Similarly, even if summary disposition has been granted under the wrong rule, we may affirm so long as summary disposition would have been correctly granted under a different subrule. *Spiek*, 456 Mich at 338 n 9.

III

Ronald first argues that the circuit court erred by dismissing his claim of breach of fiduciary duty and his claims seeking rescission of the 2003 Agreement on the grounds of duress, undue influence, and fraud. He asserts that there remained several genuine issues of material fact with regard to these four claims and that the circuit court made an improper credibility determination when it chose to believe Janet's version of events regarding the formation and execution of the 2003 Agreement over his own. He also asserts that defendants were not entitled to judgment as a matter of law because there remained unresolved issues of fact concerning whether Janet acted with unclean hands. We disagree.

The obvious problem with Ronald's breach of fiduciary duty claim is that Janet owed him no fiduciary duty with regard to the formation or execution of the 2003 Agreement. In order to maintain a claim of breach of fiduciary duty, the plaintiff must establish that the defendant owed him or her a duty of trust and confidence. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 469; 646 NW2d 455 (2002). As explained earlier, Janet owned 45 percent of the stock of the Peppler Agency and Ronald owned 55 percent of the stock of the Peppler Agency at the time. It is axiomatic that a *minority* shareholder owes no fiduciary duty to a majority shareholder. *Fausek v White*, 965 F2d 126, 131 (CA 6, 1992). We acknowledge that Ronald had appointed Janet as his attorney-in-fact pursuant to a durable power of attorney and that a durable power of attorney creates a fiduciary relationship. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). But when Janet approached Ronald and asked him to sign the 2003 Agreement, she did not do so in her capacity as Ronald's attorney-in-fact. Indeed, if she had been acting as Ronald's attorney-in-fact at the time, she could have simply signed the 2003 Agreement, herself. After all, the durable power of attorney gave Janet full authority to act on Ronald's behalf and to sell or convey any of Ronald's real or personal property. A fiduciary must act with the utmost faith and loyalty *on matters within the scope of the fiduciary relationship*. See *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003). Janet's act of persuading Ronald to sell his stock and to sign the 2003 Agreement was clearly outside the scope of her fiduciary relationship as it existed under the durable power of attorney. Because Janet owed Ronald no fiduciary duty with respect

to the formation and execution of the 2003 Agreement, Ronald's claim of breach of fiduciary duty was properly dismissed.

As for Ronald's three claims seeking rescission of the 2003 Agreement, it is undisputed that Ronald did not tender back the \$220,000 and additional deferred compensation payments received under the agreement. An action for rescission on the ground of fraud, misrepresentation, or duress carries with it certain prerequisites, including a duty on the part of the plaintiff to tender back what he or she has received. *Gloeser v Moore*, 283 Mich 425, 431; 278 NW 72 (1938); *Dorgan v Birney*, 272 Mich 145, 153; 261 NW 278 (1935). Indeed, "[o]n a rescission, it is necessary, as a rule, to tender back the property received in exchange for the consideration sought to be recovered, so as to restore the original *status quo*, and when the parties seeking relief cannot make restitution, through their own acts or fault, rescission is generally denied." *Latimer v Piper*, 261 Mich 123, 133; 246 NW 65 (1933). Because Ronald failed to tender back that which he had received, his claims seeking rescission of the 2003 Agreement were properly dismissed.³

IV

Ronald also argues that the circuit court erred by dismissing his conversion claims when the evidence established that Janet had improperly withdrawn money from the parties' joint account and that she had only repaid it after the commencement of this action. Ronald asserts that the circuit court made improper credibility determinations and improperly inquired into Janet's motivation for taking the money. Again, we disagree.

Ronald specifically testified at his deposition that he was no longer pursuing his claims of conversion and that all moneys allegedly converted by Janet had been subsequently accounted for. By testifying under oath that all the conversion claims had been resolved, Ronald effectively abandoned the claims. Moreover, given Ronald's testimony that all of the allegedly converted moneys were subsequently accounted for, the circuit court properly concluded that there remained no genuine issues of material fact. See MCR 2.116(C)(10).

Ronald argues that even though his half of the \$100,000 withdrawn from the parties' joint account was eventually paid back and fully accounted for, Janet took the money without permission in the first instance. He asserts that this, alone, is sufficient to establish that the money was wrongfully converted. But Ronald conveniently disregards the fact that Janet was authorized to withdraw the funds from their *jointly owned* account. "In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over *another's* personal

³ Ronald now asserts in his brief on appeal that he "did, in fact, attempt to tender back the stock payments to Janet." But as the pleadings and documentary evidence in this case make clear, Ronald attempted to tender back *only a portion* of the payments he had received under the 2003 Agreement. Indeed, Ronald has unequivocally stated in numerous documents that he could not afford to tender back the full \$220,000. Nor has he explained why he did not tender back the additional, substantial deferred compensation payments that he received under the 2003 Agreement.

property in denial of or inconsistent with the rights therein.” *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992) (emphasis added). The money in the parties’ joint account belonged equally to Janet and Ronald, and a person cannot convert his or her own property as a matter of law. *Id.* The circuit court did not err by dismissing the conversion claims.

V

The circuit court properly dismissed Ronald’s claims for rescission, breach of fiduciary duty, and conversion. Thus, although we do so in part for different reasons than those relied on by the circuit court, we affirm the grant of summary disposition in favor of defendants on these claims.

In light of our conclusions, we need not consider whether the circuit court made improper credibility determinations or whether defendants should have been precluded from raising the defense of laches on the ground that Janet acted with unclean hands.⁴

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

⁴ Ronald does not challenge the circuit court’s dismissal of his breach of contract and fraud claims; nor does he challenge the circuit court’s dismissal of his claims seeking an accounting and the imposition of a constructive trust. Accordingly, we decline to address these matters further.